SERVED: July 27, 1993

NTSB Order No. EA-3939

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of July, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. ANGEL LUIS DAVILA-RAMOS, Respondent.	Docket SE-11218

OPINION AND ORDER

The Administrator has appealed from the decision and order issued orally by Administrative Law Judge William R. Mullins at the close of a hearing held in this matter on March 5, 1991.[1]

Because respondent admitted the factual allegations in the complaint, the only issues at the hearing were respondent's motion to dismiss the Administrator's complaint as stale (which

[1] Attached is an excerpt from the hearing transcript containing the law judge's decision and order.

the law judge granted), and the Administrator's motion to dismiss respondent's appeal from the order of suspension as untimely (which the law judge denied). For the reasons discussed below, we grant the Administrator's appeal and reverse the law judge's order dismissing the complaint.[2]

The procedural history of this case can be summarized as follows. Respondent's violation was complete on January 3, 1988. By two separate letters dated September 23, 1988,[3] approximately one month after the violation was discovered during the course of an inspection, the FAA's Flight Standards District Office (FSDO) in Puerto Rico informed respondent, who resides in Puerto Rico, that the incident was being investigated. These two letters were sent to respondent at his place of employment. Respondent submitted a written response to the first letter and apparently met with the FAA inspector in person after receiving the second letter.

On November 28, 1988, the FAA's legal office in Atlanta, Ga., sent to respondent's home address (by certified mail, return receipt requested) a notice of proposed certificate action (NOPCA), which was returned by the Postal Service as "unclaimed."

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[2] The order of suspension alleged that respondent had violated 14 C.F.R. 135.265(a)(3) by exceeding permissible flight time for scheduled operations and other commercial flying when he accepted an assignment to serve as pilot in command of an Eastern Metro Express flight on January 3, 1988. The order sought to suspend respondent's airline transport pilot certificate for 15 days.

[3] The first letter contained an incorrect date which was corrected in the second letter.

On February 16, 1989, the legal office sent to respondent's home address (again by certified mail, return receipt requested) the order of suspension, which was also returned as "unclaimed." Notations on the returned envelopes indicate that, soon after they were returned as "unclaimed," the NOPCA and order were re-mailed to respondent by regular (non-certified) mail. These mailings were apparently not returned. Respondent asserts that he never received any of these documents, stating that the Postal Service does not deliver mail to the housing development where he lives. Although the Administrator contends that he mailed the NOPCA and order to respondent's official address of record as it was recorded with the FAA's airman certification branch, respondent asserts that his mailing address has always been a post office box and that he never submitted his residential address to the FAA as his permanent mailing address.[4]

Respondent asserts that he did not receive actual notice of this enforcement action until June 27, 1990 (almost two years after the violation was discovered), when the Administrator mailed a copy of the order to a new post office box address which respondent had listed as his mailing address on a recent application for a type rating. On July 3, 1990, respondent filed his appeal. Because counsel for the Administrator apparently indicated that respondent could be subject to additional certificate action or civil penalties if he did not immediately

[4] Respondent cannot explain how his residential address came to be listed as his official address of record, but suggests that somehow it might have been provided to the FAA by his employer.

surrender his certificate, respondent surrendered his certificate for 15 days but continued to pursue this appeal.

In our judgment, the law judge erred in dismissing the complaint in this case under our stale complaint rule.[5] As a threshold matter, we note that even though the Administrator's November 28, 1988, mailing of the NOPCA came more than nine months after the violation occurred, only some three months had passed since the Administrator's discovery of the violation. Because we have found good cause for delayed notification when the Administrator acts with dispatch once the violations are discovered,[6] the timing of the NOPCA in this case, standing alone, would not likely provide a basis for dismissing the complaint as stale.

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[5] Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

> Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:
> (a) In those cases where a complaint does not allege lack of qualification of the certificate holder:
> (1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.
> (2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

[6] See e.g. Administrator v. Richard et. al, 5 NTSB 2198, 2199 (1987).

Rather, the issue here is whether the Administrator's mailing of the NOPCA to an address which the FAA had on file as respondent's address of record, and which respondent concedes is his correct home address, was sufficient to accomplish actual or constructive service on respondent. We hold that it was. We have held that service by certified mail (returned "unclaimed"), followed by a regular (non-certified) mailing to respondent's address of record which is not returned to sender, can be construed as constructive service for purposes of defeating a stale complaint motion. Administrator v. Hamilton, NTSB Order No. EA-2743 at 7-8 (1988). Even assuming, as respondent asserts, that there is no mail delivery to respondent's housing development, we agree with the Administrator that he was entitled to a "reasonable expectation that mail sent to respondent's address of record would be delivered to him." (App. Br. at 10.)

We do not agree with the law judge's reasoning that, because the FAA inspector at the local FSDO had successfully used respondent's employment address to reach him, the Administrator's counsel was also required to attempt service through that address in order to be found duly diligent. To the contrary, we believe that service on respondent at his address of record is sufficient. Even assuming, as respondent asserts, that he did not actually receive notice of this enforcement action until he received a copy of the order at his new post office box on June 27, 1990, we find that, in view of the Administrator's timely mailing to respondent's home address and his prompt notification

to respondent's post office box once he was apprised of its existence, good cause has been shown for the delay.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The law judge's decision and order is reversed; and

3. The order of suspension is affirmed.[7]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[7] Because respondent admits to the substantive violation, and has already served the 15-day suspension sought in the complaint, no purpose would be served by remanding this case for a hearing.